Canadian HIV/AIDS Legal Network | Réseau juridique canadien VIH/sida

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Introduction

1. The Canadian HIV/AIDS Legal Network (www.aidslaw.ca) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, litigation and other advocacy, public education and community mobilization. Established in 1992, it is an NGO in Special Consultative Status with the Economic and Social Council of the United Nations.

2. This submission focusses on various aspects of Canada's obligation to realize progressively the **right to the highest attainable standard of health** under the *International Covenant on Economic, Social and Cultural Rights* (Article 12), and specifically the right to health of people with addictions inside and outside prisons.

A. The right to health of people who use drugs: harm reduction services

3. According to the Committee on Economic, Social and Cultural Rights (CESCR), one core aspect of the right to health is the obligation "[t]o ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups."[1] Yet the Government of Canada has repeatedly demonstrated its hostility toward evidence-based health services that protect the health and save the lives of people with addictions, and has even taken "deliberately retrogressive measures," which the CESCR has noted presumptively violate the right to health.[2]

4. The Government of Canada launched a new National Anti-Drug Strategy in 2007. In contrast with previous national strategies, which reflected a widespread national consensus among service providers, researchers and affected populations, this new strategy eliminated the long-standing element of *harm reduction* as part of the Government's response to drugs. Harm reduction includes such evidence-based health services as needle and syringe programs (NSPs) and supervised injection services (SIS), which are of particular importance in protecting the health of people who use illegal drugs. Most recent data indicates that 17% of new HIV infections in Canada are attributable to injection drug use, and HIV prevalence among people who inject drugs ranges from 3% to 21% at different surveillance sites (which is from 15 to 105 times the 0.2% HIV prevalence in the overall population).[3] Harm reduction programs are proven to lessen the harms associated with drug use, including by reducing transmission of HIV and hepatitis C virus (HCV). They are, therefore, essential for protecting the right to health of people who use drugs.

5. Furthermore, obstructing the delivery of such services disproportionately undermines the health of populations such as Aboriginal people, among whom injection drug use is disproportionately high as a major driver of the HIV epidemic in Canada.[4] Among Aboriginal Canadians, the estimated proportion of new HIV infections in 2008 attributed to injection drug use was 66%, almost four times higher than among all Canadians.[5] This raises additional concerns about the discriminatory impact of government action or policy impeding access to such services.

6. Government hostility has been most evident with regard to Insite, Vancouver's supervised injection facility, which has measurably decreased syringe-sharing and deaths from overdose, reduced the risk of HIV and HCV transmission, and increased referrals to addiction treatment services.[6] Despite Insite's proven effectiveness in protecting the health of people who use drugs, the Government threatened to discontinue the legal exemption from the *Controlled Drugs and Substances Act* that permits it to operate without risk of clients or staff being criminally prosecuted for drug possession. The Government then appealed initial court decisions upholding Insite's exemption as a matter of constitutional rights.

7. Finally, in September 2011, the Supreme Court of Canada ruled unanimously that Canada had unconstitutionally violated the human rights of people with addictions.[7] The Court found that the federal government had effectively decided to deny any further exemption to Insite and that this decision was "arbitrary," in that it undermined public health and safety, which are ostensibly the very purposes of Canada's drug laws. The Court said such a decision was also "grossly disproportionate," since "the potential denial of health services and the correlative increase in the risk of death and disease to injection drug users outweigh any benefit that might be derived from maintaining an absolute prohibition on possession of illegal drugs on Insite's premises." The evidence established that people are considerably safer administering their own injections under medical surveillance rather than injecting hard drugs in non-hygienic conditions on the streets. As the Court declared: "Insite saves lives. Its benefits have been proven." It ruled that shuttering Insite would constitute an impermissible violation of the human rights of some of those who are most vulnerable; the criminal prohibition on drug possession could not be allowed to extend so far as to impede access to such health services for people with addictions. The Court ordered the Minister to grant an ongoing exemption to Insite.

8. Community health services in several other Canadian cities have since stated their interest in creating similar services to address documented health needs of people with addictions. There is widespread concern that, given the open hostility to harm reduction, the federal Minister of Health will refuse applications for additional legal exemptions permitting such services to operate without risk of prosecution.

RECOMMENDATION*: *The Government of Canada should approve, without delay, requests for exemptions for additional supervised injection services in Canada where such applications are supported by evidence demonstrating the need for, and feasibility of, such health services.

9. Needle and syringe programs (NSPs) are a proven, cost-effective intervention to reduce the transmission of blood-borne viruses such as HIV and HCV among people who inject drugs, yet multiple barriers hinder NSPs in Canada. The distribution of sterile injection equipment is far below what is required to stop the spread of blood-borne infections: about 5% of the required number of syringes is distributed in the province of Ontario each year.[8] Some municipalities have passed by-laws prohibiting NSPs.[9] Where NSPs exist, police crackdowns and other law enforcement operations interfere with NSPs' work and discourage the most marginalised users from accessing services. Available evidence indicates crackdowns may lead to a significant decline in sterile syringes distributed.[10] Elevated police presence has also deterred some people from using NSPs and encouraged lending and borrowing of injection equipment.[11] Moreover, NSPs are insufficiently funded: under the current system, provinces and territories establish or fund NSPs at their discretion, with few or no incentives from the federal Government.[12] The CESCR characterises "insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized" as a violation of the obligation to fulfil the right to health.[13]

RECOMMENDATIONS: *In order to comply with its obligation to realize progressively over time the highest attainable standard of health for all persons, without discrimination, the Government of Canada must support harm reduction measures. It should do so by restoring this public health component to the country's national drug strategy, and by increasing funding for NSPs and SIS as key components of a pragmatic, evidence-based, comprehensive public health approach to dealing with drugs. In addition, provincial and territorial governments need to mandate explicitly that NSPs are necessary services in every health region.*[14] *Finally, federal, provincial/territorial and municipal governments must take steps to ensure that the enforcement of drug laws does not interfere with the delivery of, and access to, these health services.*

B. The right to health of prisoners: harm reduction in prisons

10. High rates of incarceration of people who use drugs in Canada, and the extent of unsafe injection drug use in prisons, pose an urgent and ongoing threat to the health and safety of prisoners and to public health more generally. Yet the Government of Canada has consistently refused to implement comprehensive, evidence-based harm reduction services in prisons, contravening the obligation to take steps to realize progressively the right to the highest attainable standard of health. Such refusal also discriminates against people with a disability (addiction), indigenous people and women. According to the Correctional Service of Canada (CSC), 80% of people incarcerated in federal prisons have substance-use problems.[15] Aboriginal people are disproportionately incarcerated and disproportionately experience high prevalence of both addictions and infection with HIV and HCV, and among Canadian prisoners, a higher proportion of women than men report a history of injection drug use, often linked to underlying factors such as sexual or physical abuse or violence.[16]

11. The scarcity of sterile syringes, and punishment if caught using drugs, lead prisoners to use non-sterile, often makeshift, injecting equipment. In 2010, CSC reported that 17% of men and 14% of women in federal prisons indicated having injected drugs while imprisoned, and among these, 55% of men and 41% of women reported using a needle previously used by someone else.[17] Therefore, it is not surprising that HIV prevalence among federal prisoners is 15 times the estimated prevalence in the Canadian population as a whole, and HCV is 39 times more prevalent.[18]

12. To date, prison-based needle and syringe programs (PNSPs) have been introduced in over 60 prisons of varying sizes and security levels in 11 countries.[19] Evaluations, including by the Government's own Public Health Agency,[20] have consistently demonstrated that PNSPs reduce the use of non-sterile injecting equipment and resulting blood-borne infections, do not lead to increased drug use or injecting, reduce drug overdoses, lead to a decrease in abscesses and other injection-related infections, facilitate referral of users to drug treatment programmes, and have not resulted in needles being used as weapons against prisoners or staff.[21]

13. Under international law, prisoners retain all rights except insofar as those are necessarily limited by incarceration.[22] This includes the right to the highest attainable standard of health.[23] Prisoners have a right to a standard of health care equal to that available outside of prisons (the "principle of equivalence"),[24] which necessarily includes preventive measures comparable to treatment and services available in the community. According to CESCR, "States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees… to preventive…health services."[25] Despite this, while NSPs have been operating in

communities across Canada for more than two decades, with funding from various levels of government, no such program operates in a single Canadian prison.

14. Providing sterile syringes to prisoners to prevent the spread of blood-borne viruses has been supported by CSC's own Expert Advisory Committee on HIV in prisons,[26] health care professionals such as the Canadian Medical Association[27] and Ontario Medical Association,[28] the Canadian Human Rights Commission,[29] and repeatedly by the Correctional Investigator of Canada (federal prisons ombudsman),[30] as well as by the UN's specialized technical agencies[31] and High Commissioner for Human Rights,[32] as a matter of sound public health policy and human rights.

15. Community organizations have repeatedly requested the federal Ministers of Health and of Public Safety (responsible for correctional institutions) to implement PNSPs. As an alternative, several community-based organizations providing NSPs outside prisons have offered to deliver such services in federal prisons, but have been refused or ignored.[33]

16. Despite the evidence and repeated recommendations, the Government of Canada has flatly refused to implement programs to ensure access to sterile injection equipment in federal prisons, and despite repeated inquiries, has failed to provide any justification.[34] Canada has also failed to address the concern that denial of such health services is effectively deadly discrimination on the basis of disability (addiction), sex and race/ethnicity.

RECOMMENDATIONS: *In order to comply with its obligation to realize progressively over time the highest attainable standard of health for all persons, and to avoid discrimination in access to health services for some of those most at risk of harms such as HIV and HCV infection, the Government of Canada should, in accordance with the extensive scientific evidence and the recommendations from domestic and international health and other experts, follow international best practices by implementing prison-based needle and syringe programs in all prisons without delay.*

NOTES

[1] UN Committee on Economic, Social, and Cultural Rights, *General Comment 14: The right to the highest attainable standard of health*, 22nd Sess., (2000) UN Doc E/C.12/2000/4, para. 43(a).
[2] UN Committee on Economic, Social, and Cultural Rights, *General Comment 3: The nature of States parties' obligations*, 5th Sess., (1990) UN Doc E/1991/23, para. 9; and see CESCR, *General Comment 14*, ibid., paras. 32 and 48.
[3] Public Health Agency of Canada (PHAC), *HIV/AIDS Epi Updates – July 2010* (Ottawa: PHAC, 2010), online: http://www.phac-aspc.gc.ca/aids-sida/publication/epi/2010/10-eng.php.
[4] PHAC, *Population-Specific HIV/AIDS Status Report: Aboriginal Peoples* (Ottawa: PHAC, 2010), online: www.phac-aspc.gc.ca/aids-sida/publication/ps-pd/aboriginal-autochtones/index-eng.php.
[5] PHAC, "HIV/AIDS Among Aboriginal People in Canada," *HIV/AIDS Epi Updates*, July 2010, online: www.phac-aspc.gc.ca/aids-sida/publication/epi/2010/8-eng.php.
[6] Expert Advisory Committee, *Vancouver's INSITE service and other Supervised Injection Sites: What has been learned from research?* (31 March 2008), online: www.hc-sc.gc.ca/ahc-asc/pubs/_sites-lieux/insite/index-eng.php; T. Kerr et al., "Impact of a Medically Supervised Safer Injection Facility On Community Drug Use Patterns: A Before and After Study," *British Medical Journal* 2006; 332: 220-222.
[7] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.
[8] A. Klein, *Sticking Points: Barriers to access to needle and syringe programs in Canada* (Canadian HIV/AIDS Legal Network, 2007).
[9] E.g., J. Keller, "Health officials, advocates call on Abbotsford to end needle exchange ban," *The Canadian Press*, July 9, 2012, online: http://thetyee.ca/Blogs/TheHook/Municipal-Politics/2012/07/09/Abbotsford-Ban-End/.

[10] E. Wood et al., "The impact of a police presence on access to needle exchange programs," *Journal of Acquired Immune Deficiency Syndrome* 2003; 34(1): 116-117; J. Csete & J. Cohen, *Abusing the user: Police misconduct, harm reduction and HIV/AIDS in Vancouver*, Human Rights Watch (2003), online: http://www.hrw.org/reports/2003/05/06/abusing-user.
[11] J. Csete, *Do Not Cross: Policing and HIV Risk Faced by People Who Use Drugs* (Canadian HIV/AIDS Legal Network, 2007), online: http://www.aidslaw.ca/publications/publicationsdocEN.php?ref=715.
[12] Klein, op. cit.
[13] CESCR, *General Comment 14*, op. cit., para. 52.
[14] This is currently the case in one province: Ontario Ministry of Health, *Mandatory Health Programs and Services Guidelines* (Dec 1997), published pursuant to *Health Protection and Promotion Act*, R.S.O. 1990, c. H.7, s. 5.
[15] CSC Review Panel, *A Roadmap to Strengthening Public Safety* (Ottawa: Government of Canada, 2007), at vii and 4.
[16] For a detailed overview of the evidence, see S. Chu & R. Elliott, *Clean Switch: The Case for Prison Needle and Syringe Programs in Canada* (Canadian HIV/AIDS Legal Network, 2009).
[17] D. Zakaria et al., *Summary of Emerging Findings from the 2007 National Inmate Infectious Diseases and Risk-Behaviours Survey* (Ottawa: CSC, March 2010).
[18] Ibid.
[19] R. Lines et al., *Prison Needle Exchange: Lessons from a comprehensive review of international evidence and experience* (Canadian HIV/AIDS Legal Network, 2006); R. Jürgens, *Interventions to Address HIV/AIDS in Prisons: Needle and Syringe Programmes and Decontamination Strategies* (WHO, UNODC & UNAIDS, 2007).
[20] PHAC, *Prison needle exchange: Review of the evidence* (Ottawa: PHAC, April 2006).
[21] Lines et al., op. cit.; Jürgens, op. cit., H. Stöver and J. Nelles, "10 years of experience with needle and syringe exchange programmes in European prisons: A review of different evaluation studies," *International Journal of Drug Policy* 2003; 14: 437-444.
[22] *Basic Principles for the Treatment of Prisoners*, UNGAOR, 45th Sess., Supp. N 49A, UN Doc A/45/49 (1990), Principle 5.
[23] CESCR, *General Comment 14*, op. cit. As HIV and HCV are potentially fatal diseases, the right to life is also relevant in considering states' obligation to take effective measures to prevent HIV and HCV transmission in prisons: UN Human Rights Committee, *General Comment No. 6: The right to life (Article 6)*, 16th Sess., (1982) UN Doc. HRI\GEN\1\Rev.1 at 6, para 5.
[24] *Basic Principles for the Treatment of Prisoners*, UNGAOR, 45th Sess., Supp. N 49A, UN Doc A/45/49 (1990), Principle 9.
[25] CESCR, *General Comment 14*, op. cit., para. 34.
[26] CSC, *HIV/AIDS in Prisons: Final Report of the Expert Committee on AIDS and Prisons* (Ottawa: Government of Canada, 1994).
[27] Canadian Medical Association, Resolution 26 of 15 August 2005, online: www.cma.ca/index.cfm/ci_id/45252/l.htm.
[28] Ontario Medical Association (OMA), *Improving our Health: Why is Canada Lagging Behind in Establishing Needle Exchange Programs in Prisons? A Position Paper by the Ontario Medical Association* (Toronto: OMA, 2004).
[29] Canadian Human Rights Commission (CHRC), *Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women* (Ottawa: CHRC, 2003), Recommendation No. 4.
[30] Correctional Investigator of Canada, *Annual Report of the Office of the Correctional Investigator 2003-2004* (Ottawa, 2004) and *Annual Report of the Office of the Correctional Investigator 2009-2010* (Ottawa, 2010), online via http://www.oci-bec.gc.ca/archives-eng.aspx#AR.
[31] WHO, *WHO Guidelines on HIV Infection and AIDS in Prisons*, 1993; UNODC, WHO and UNAIDS, *HIV/AIDS Prevention, Care, Treatment and Support in Prison Settings: A Framework for an effective National Response* (Geneva/Vienna, 2006); UNAIDS, "Statement on HIV/AIDS in Prisons to the UN Commission on Human Rights at its Fifty-second session, April 1996," in *Prison and AIDS: UNAIDS Point of View*, 1997.
[32] *International Guidelines on HIV/AIDS and Human Rights, Consolidated Version*, UN Doc. HR/PUB/06/9, Office of the UN High Commissioner for Human Rights and UNAIDS (Geneva, 2006).
[33] Correspondence on file with the Canadian HIV/AIDS Legal Network.
[34] Extensive correspondence on file with the Canadian HIV/AIDS Legal Network, including most recently a letter from Mr. Vic Toews, Minister of Public Safety, dated September 11, 2012 reiterating that CSC "is not considering the introduction of prison-based needle exchange programs."